UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

RAMON ARMAS BORROTO, JR.

Plaintiff,

vs. **Case No. 5:04CV165-RH/WCS**

L. MCDONALD, PATE, SPEIGHT, MCKENZIE and KENT.

Defendants.
_____/

Defendants' Supplement to Defendants' Special Report

Defendants McDonald, PATE, McKenzie, and KENT through undersigned counsel, hereby supplement Defendants' special report Doc. 61 & 62,[1] as follows:

[1] Defendant Kent adopts the Special Report as her response to the complaint.

Defendants' Supplemental Statement of Facts

Nurse Kent

Nurse Kent has conducted hundreds of medical exams on inmates while working at Washington C.I. It was her practice to document her exams. Although this is a standard medical practice, Nurse Kent was conscientious about documenting her exams to address grievances or complaints by inmates about the care they received from her. See Exhibit X (Affidavit of Donna Kent).[2]

According to Nurse Kent, if she made a chart entry or notation about an inmate, it was because she examined the inmate. She denies fabricating the chart entry for Ramon Borroto, #X27467, on November 28, 2002. See Exhibit X.

At the time of November 28, 2002, medical rounds were made in confinement and close management units on a daily basis. There was no exception for weekends and holidays. See Exhibit X.

The Inspection of Special Housing Record for November 28, 2002, bears her initials placed there when she entered the unit at 8:30 a.m. See Exhibit X, Exhibit 1. Generally, when she made rounds in G dorm, she had to go to all four quads and pass by every cell. If an inmate had a medical complaint she would arrange with the dormitory staff to pull out the inmate after she finished her walk-through. These examinations were

[2] The undersigned has redacted Nurse Kent's driver's license number on page 4 of the affidavit. See Exhibit X. The undersigned can provide this information to the Court *in camera* in the event that such information would be deemed necessary.

generally conducted in what is considered the medical room of the dorm. See Exhibit X.

Nurse Kent has reviewed the medical chart entry she made regarding Plaintiff Ramon Borroto on November 28, 2002. See Exhibit X, Exhibit 2. Her entry indicates that she had Plaintiff pulled out for examination because he complained of a lingering sinus problem. See Exhibit X, Exhibit 2. She took his vital signs which were within normal limits. See Exhibit X, Exhibit 2. She observed no runny nose, no cough, and no sneezing. She found that Plaintiff had clear lungs and breathed with ease. See Exhibit X, Exhibit 2. Nurse Kent considered Plaintiff's sinusitis questionable. She determined that Plaintiff did not need medical intervention at the time of her evaluation. See Exhibit X, Exhibit 2.

Often Nurse Kent had to finish paperwork after she had conducted the examinations. Therefore, the time she wrote on the charts was often an approximation. See Exhibit X. According to Nurse Kent, medical staff did not have to record their departure times. See Exhibit X.

Given the number of inmate examinations Nurse Kent has conducted, she does not remember Mr. Borroto specifically. She has relied upon the chart entry of November 28, 2002, to provide her affidavit. See Exhibit X.

Plaintiff has alleged that, on November 28, 2002, while in Nurse Kent's presence, Officer McDonald punched him in the stomach many times, then punched him in the ear and on his head, and then put Plaintiff's head between his legs, picked him up and

slammed him on his head. Though Nurse Kent does not remember the examination of Plaintiff specifically, she states with certainty that she did not witness a physical assault upon Plaintiff by Officer McDonald as described by Plaintiff. See Exhibit X.

Nurse Kent has had to be confronted with a brand new allegation made by the Plaintiff. See Doc. 67, pg. 2 & 5. Plaintiff alleges that he was masturbating while speaking to Nurse Kent at his cell door. See Doc. 67, pg. 2 & 5. Nurse Kent does not recall one way or the other if Plaintiff in fact engaged in this form of inappropriate behavior when she visited his cell door. See Exhibit X. Nevertheless, Nurse Kent explains that inmates who engaged in inappropriate behavior such as this were not refused medical attention. Though Nurse Kent does not recall whether Plaintiff engaged in the inappropriate action he now alleges, it is evident by his chart that she did not refuse to examine him for his sinus complaint. See Exhibit X; Exhibit 2.

Inspector Yaw

As Inspector Supervisor for the Florida Department of Corrections, Tim Yaw's duties and responsibilities include oversight of all investigations in Institutional Region I. See Exhibit Y. On March 5, 2003, Inspector Yaw submitted a Report of Investigation to the Acting Inspector General for the Department regarding Plaintiff's allegation that he had been physically abused at Washington Correctional Institution on the morning of November 28, 2002. See Exhibit Y; see exhibit 1 (Report of Investigation #02-13942). Inspector Yaw determined that the evidence obtained during the course of the

investigation was not sufficient to support the allegation of physical abuse by Officer McDonald. See Exhibit Y; see exhibit 1, at p. 3 & exhibit 2 (Corrective Action/Disposition Report). Inspector Yaw concluded that the witness statements and the minor injuries found contradict the allegation. See Exhibit Y. Based on Inspector Yaw's past experience, the medical indications were inconsistent with the allegations of abuse made by Plaintiff. Inspector Yaw advises that it is entirely possible that the minimal injuries noted by Nurse Conger came from another source. See Exhibit Y.

Inspector Yaw addresses Plaintiff's transfer to Santa Rosa on December 19, 2002, which occurred after Plaintiff met with Inspector Kraus on that date. See Exhibit Y. Inspectors customarily order transfers in cases where inmates allege physical abuse. See Exhibit Y. According to Inspector Yaw, such an order does not necessarily imply a conclusion that the inmate's allegation is substantiated. See Exhibit Y. The measure is a precautionary one. Once an inspector receives a case, the assigned inspector is responsible for the well being of the inmate and the integrity of the investigation. The typical coding for such a transfer is "population adjustment." See Exhibit Y. In Plaintiff's case, he was transferred prior to the conclusion of the investigation. His transfer was coded as a "population adjustment."[3] See Exhibit Y. This is consistent with

[3] Defendants clarify that where the Special Report stated, "Plaintiff was given a transfer for population adjustment. See Doc. 37, ex. 2," see Doc. 61 at pg.8, the reference was a recitation of the information contained in the email correspondence between Washington C.I. and the Department of Corrections Central Office referencing Plaintiff's transfer to Santa Rosa Correctional Institution.

precautionary transfers. See Exhibit Y.

Unfortunately, inmates are aware that allegations of physical abuse will often result in an IG transfer. According to Inspector Yaw, it is not uncommon for inmates to fabricate allegations of abuse to exploit this precautionary measure. See Exhibit Y.

Plaintiff's new allegations

Plaintiff has submitted a Reply to Defendants' Special Report, which includes new allegations. See Doc. 67 (Plaintiff's Reply to Defendants' Special Report). First, Plaintiff alleges that he was not examined by Nurse Kent because it was a holiday and according to Plaintiff "sick call evaluations" are never on holidays. See Doc. 67, at pg. 1. Plaintiff makes a second allegation that he was masturbating while he spoke to Nurse Kent at his cell door. See Doc. 67, pg. 2 & 5 According to Plaintiff, Nurse Kent reported his behavior to Defendant McDonald and this prompted Defendant McDonald to remove Plaintiff from his cell, take Plaintiff to the examination room, and then physically assault Plaintiff in the presence of Nurse Kent and three other officers. See Doc. 67, pg. 2 & 5.

Statement of Undisputed Facts

The parties do not dispute that in the early hours of November 29, an officer communicating with Plaintiff recorded that Plaintiff alleged that staff "hit [him] in [his] hands and in [his] ear." See Doc. 62; Exhibit A-2.

Plaintiff reported to Captain Scott, a non-defendant, that he had been physically abused. See Doc. 62; Exhibit D. Plaintiff provided a written affidavit stating that he had

been pulled out of his cell the day before to a room with no cameras. According to Plaintiff, Officers McDonald and Pate, Sergeant McKenzie, Nurse Kent, and another officer were present. Plaintiff alleged that Officer MacDonald

> . . . began to punch me in my stomache [sic]. He did this many times. Then punch me in my ear and my head. The [sic] put my head between his legs picked me up and slammed me on my head.

See Doc. 62; Exhibit E. Plaintiff was examined by Nurse Conger. See Doc. 62; Defendants' Exhibits B & F. Nurse Conger recorded that Plaintiff stated he was hit on the back of the head, ears, and abdomen. See Doc. 62; Exhibit F. However, he was found to have no edema or mark on his abdomen or the rear of his head. See Doc. 62; Defendant's Exhibits F & G. There was slight bruising and redness on his left ear lobe. There was also noted a small mark behind his left ear on the scalp near the hairline. See Doc. 62; Defendant's Exhibits F & G. Plaintiff admits that there were no marks on his abdomen and that his alleged injuries were "not life threatening." See Doc. 67, pg. 2 & 4.

The further parties agree that Plaintiff did not allege a staff assault during the shift in which Plaintiff alleges it occurred. See Doc. 67, pg. 1. The parties also agree that Plaintiff went out to recreation the day after he alleges he was assaulted. See Doc. 67, pg. 3. The parties do not dispute that Plaintiff attempted to manipulate a transfer through various means including making a "cut on his wrist," and conspiring with inmate Derryberry to concoct a scenario by which he could "check in," under the pretense that he needed protection from inmate Derryberry. Doc. 67, pg. 3; See also Doc. 62; H-1; V-4.

Memorandum of Law

I. Standard for Summary Judgment

Summary judgement is proper if the pleadings and sworn statements show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corporation v. Catrett, 477 U.S. 317, 322 (1986). The party moving for summary judgment bears the initial burden of demonstrating an absence of evidence to support the nonmoving party's case. Celotex, 477 U.S. at 322-23. Upon meeting this burden, the burden shifts to the nonmoving party to present evidentiary material demonstrating that a genuine issue of material fact exists. Id.

Applicable substantive law identifies those facts that are "material." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Factual issues must have a real basis in the record to be considered genuine and the nonmoving party must show more than a "metaphysical doubt" regarding the material facts. Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986). The evidence and reasonable inferences drawn from the evidence are viewed in the light most favorable to the nonmoving party. Watkins v. Ford Motor Co., 190 F.3d 1213, 1216 (11th Cir. 1999).

Although all reasonable inferences are made in favor of the nonmoving party, a court need not permit a case to go to a jury when the inferences drawn from the evidence and upon which the nonmoving party relies are "implausible." Cuesta v. School Bd. of

Miami-Dade County, 285 F.3d 962, 970 (11th Cir. 2002)(citations omitted). A mere "scintilla" of evidence in support of the nonmoving party's position is not sufficient; there must be evidence upon which a jury could reasonably find for the nonmoving party. Anderson, 477 U.S. at 252; see also Matsushita, 475 U.S. at 587 (there is no genuine issue for trial if record taken as a whole would not lead a rational trier of fact to find in favor of non-moving party). In other words, summary judgment is warranted against a nonmoving party who "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322.

II. Elements of Section 1983 Action

The initial inquire in any section 1983 action focuses on whether the two essential elements to a section 1983 action are present:

> (1) whether the person engaged in the conduct complained of was acting under color of state law; and (2) whether the alleged conduct deprived a person of rights, privileges or immunities guaranteed under the Constitution or laws of the United States.

Duke v. Massey, 87 F.3d 1226, 1231 (11th Cir. 1996)(citations omitted); see also Hale v. Tallapoosa County, 50 F.3d 1579, 1582 (11th Cir. 1995). If either element is missing, the claim fails. Here, Defendants did not engage in conduct that deprived Plaintiff of his rights under the constitution.

III. Eighth Amendment's Proscription of Cruel and Unusual Punishment

The unnecessary and unwanton infliction of pain constitutes cruel and unusual

punishment proscribed by the Eighth Amendment. Whitley v. Albers, 475 U.S. 312, 319 (1986) (quoting Ingraham v. Wright, 430 U.S. 651, 670 (1977))(internal quotation omitted). The evidence required to establish an unnecessary and wanton infliction of pain varies according to the nature of the alleged violation. Whitley, 475 U.S. at 320. In cases where corrections officials use force on a prisoner, the inquiry focuses on "whether the force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." Whitley, 475 U.S. at 320-321 (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (CA2), cert. denied sub nom. John v. Johnson, 414 U.S. 1033 (1973)). In determining whether force was wanton and unnecessary, courts may consider factors such as the need for application of force, the relationship between the need for force and the amount of force used, the extent of injury inflicted, the threat to staff and inmates posed by the inmate on whom force was used, and efforts made to temper the severity of the force. Whitley, 475 U.S. at 321.

The absence of significant injury does not preclude an Eighth Amendment claim where prison officials maliciously and sadistically use force to cause harm. Hudson v. McMillian, 503 U.S. 1, 9 (1992). However, "that is not to say that every malevolent touch by a prison guard gives rise to a federal cause of action." Hudson, 503 U.S. at 9. The Eighth Amendment's prohibition of cruel and unusual punishment excludes from recognition de minimis uses of force, so long as the use of force is not repugnant to the conscience of mankind. Hudson, 503 U.S. at 9-10 (internal citation and quotations

omitted).

The instant case fails to demonstrate a violation of the Eighth Amendment. Although a nonmoving party will survive summary judgment if there is a "genuine" issue of material fact, the factual issues must have a real basis in the record to be considered genuine. Matsushita, 475 U.S. at 586-87. Here, there is no real basis in the record, other than Plaintiff's self-serving statements, to indicate that any force was ever used on him.

Plaintiff alleges he was hit "6 or 7 times in the abdominal area," Doc. 67, at p. 1, punched in his ear and his head, and then picked up and slammed on his head. Yet, there is no sufficient corroborating evidence to substantiate this allegation. One would expect that this type of force to the abdomen would cause, at a minimum, swelling or bruising. One would expect that being dropped[4] on one's head would result in a fracture, or, at the least, swelling or significant bruising. Yet, when Plaintiff was medically evaluated several hours after the alleged incident only a small mark behind his left ear on the scalp near the hairline and slight bruising to his ear was visible. See Doc. 62; See Defendants' Exhibits F & G. He was found to have no edema or mark on his abdomen or the rear of his head. See Doc. 62; Defendants' Exhibits F & G. Indeed, his condition was assessed by Nurse Conger as "Good." See Doc. 62; Defendants' Exhibit F. Further, his physical appearance was observed earlier in the day by dormitory staff as good. See Doc. 62; Defendants' Exhibit A-1. One would assume that pain and discomfort would be attendant

[4] Or "slammed" as Plaintiff states in one instance.

with the force alleged by Plaintiff. Yet, less than twelve hours after making his complaint to the Captain, Plaintiff participated in recreation. See Doc. 62; Defendants' Exhibit A-1.

Inmates are aware that allegations of physical abuse will often result in an IG transfer. See Exhibit Z. According to Inspector Yaw, it is not uncommon for inmates to fabricate allegations of abuse to exploit this precautionary measure. See Exhibit Z. Plaintiff's astounding allegation of abuse is logically construed as an effort to effectuate a transfer. When a transfer did not occur immediately, Plaintiff made a "cut on his wrist," and conspired with inmate Derryberry to concoct a scenario by which he could "check in," under the pretense that he needed protection from inmate Derryberry. Doc. 67, pg. 3; See also Doc. 62; H-1; V-4.

Accordingly, the record taken as a whole would not lead a rational trier of fact to find that Plaintiff met his burden of proving that he was subjected to cruel and unusual punishment on November 28, 2002. Matsushita, 475 U.S. at 587 (there is no genuine issue for trial if record taken as a whole would not lead a rational trier of fact to find in favor of non-moving party). Thus, there is no genuine issue and summary judgment should be granted in favor of the Defendants.

Plaintiff nevertheless, maintains the alleged injuries constitute evidence of an assault on him by Officer McDonald. These "injuries" were documented several hours after the alleged incident. A mere "scintilla" of evidence in support of the nonmoving party's position is not sufficient to survive summary judgment. Anderson, 477 U.S. at

252. Moreover, as argued in Defendant's Special Report, Plaintiff's medical records contain no evidence of an injury any greater than a de minimis one. See Doc. 62; Defendants' Exhibit J-2; See Defendants' Exhibit Q; Defendants' Exhibits K-1, K-2, L-1, L-2, M-1, M-2, N-1, N-2, O-1, O-2, P-1; P-2; Q-1.

In Siglar v. Hightower,112 F.3d 191 (5th Cir.1997), a prisoner filed a Section 1983 claim against Texas prison officials after guards bruised his ear during a search. The ear remained bruised and sore for three days. The prisoner did not seek or receive medical treatment, nor did he allege that he had suffered any long-term physical injuries. The court dismissed the prisoner's claim, stating,

> "In the absence of any definition of "physical injury' in Section 1997e(e), we hold that the well established Eighth Amendment standards guide our analysis in determining whether a prisoner has sustained the necessary physical injury to support a claim for mental or emotional suffering. That is, the injury must be more than de minimus [sic], but need not be significant."

Oliver v. Keller, 289 F.3d 623 (9th Cir. 2002) (quoting Sigler at 193). The Eleventh Circuit has explicitly adopted the Siglar de minimis approach. Harris, 216 F.3d 970 (11th Cir.2000) (en banc), reasoning that an interpretation that "any allegation of physical injury is sufficient ... would undermine the statute's essential purpose--'to curtail frivolous and abusive prisoner litigation.' " This Circuit has held that "[a] de minimis use of force cannot support a claim for excessive use of force." Skrtich v. Thornton, 280 F.3d 1295, 1302 (11th Cir. 2002). Not every malevolent touch by a prison guard gives rise to a

federal cause of action. Hudson v. McMillian, 503 U.S. 1, 9, (1992)(citing Johnson v. Glick,481 F.2d 1028, 1033 (2nd Cir. 1973)("Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights")).

> The Eighth Amendment's prohibition of "cruel and unusual" punishments necessarily excludes from constitutional recognition de minimis uses of physical force, provided that the use of force is not a sort "repugnant to the conscience of mankind." Whitley, 475 U.S., at 327, 106 S.Ct., at 1088 (quoting Estelle, supra 429 U.S., at 106, 97 S.Ct., at 292)(internal quotations marks omitted).

Id. at 9-10.

In the instant case, the medical record does not reflect that the Plaintiff was subjected to an assault of the magnitude he alleges. See Adams v. Compton, 2005 U.S. Dist. LEXIS 19755 (D. Va. 2005)(Even if true Plaintiff's allegations of two knots on his forehead, and bruises on his head, neck, back, and sides alleged nothing more than de minimis injuries.); Carranza v. Newman, 2004 U.S. Dist. LEXIS 10333 (D. Tex. 2004)(a temporary bump on the head is insufficient to state a physical injury for purposes of liability under the Civil Rights Act); Long v. Hatt, 979 F. Supp. 481, 486 (N.D. Tex 1997)(sore muscles, scratches, abrasions and bruises do not constitute a "physical injury" within the meaning of 1997e(e)); Smith v. Horn, 2004 U.S. Dist. LEXIS 11306 (D. Pa. 2004)(Inmate who was cuffed, pushed, and suffered a bruise and bump on the head was subjected to objectively reasonable de minimis force and did not sustain any serious injury. Hines v. Hunt, 1994 U.S. Dist. LEXIS 11192 (D. Ala. 1994)(Inmate's claim that

he had suffered a bump on the right side of the head, but was alert and oriented and in no apparent acute distress stated at most a minimal injury); See also Mays v. Rewis, United States District Court Middle District of Florida case number 3:04-CV-737-J-20MMH, (November 9, 2005)(Plaintiff's claim he suffered injuries after correctional officer allegedly kneed him in the stomach was unsupported by the medical record, failed to demonstrate any physical injury and was barred by 42 U.S.C. s. 1997e(e).(Defendants' Exhibit Z).

Plaintiff, nevertheless, now attempts to attribute malice to Defendants, where he had not done so before, by claiming that he masturbated while speaking to Nurse Kent at his cell door and that this is what allegedly prompted Defendant McDonald to assault him in the presence of Nurse Kent and three other officers later in the examination room. See Doc. 67, pg. 2 & 5. Yet, the affidavit previously given by Plaintiff on November 29, 2002, attributes no motive for the alleged assault.[5] See Doc. 62, Defendants' Exhibit E. Plaintiff's complaint and amended complaint likewise attribute no motive for the alleged assault either. See Docs. 1 & 19. Plaintiff's last ditch effort to save his claim must fail. The Eleventh Circuit has recognized the problem of factual discrepancies brought by prisoners in the judicial process and has supported dismissal of claims based on such discrepancies. See e.g. Bilal v. Driver, 251 F.3d 1346, 1350 (11th Cir. 2001). Further,

[5]New allegations such as this illustrate the value of requiring inmates to pursue the inmate grievance procedure. Because this allegation was not grieved or otherwise documented, a record was not developed addressing this issue.

Plaintiff has made this belated allegation in a conclusory fashion, supported by only with his self-serving statements. See id.

Plaintiff further attempts to attribute malice to the Defendants by alleging that Defendant Kent "falsified" the medical chart entry she made to "cover up" the alleged assault. See Doc. 67, pg. 1 & 3. As support for this, he states that it was a holiday and "sick call evaluations" are never on holidays. See Doc. 67, at pg.1. Nurse Kent, however, has substantiated her chart entry with her affidavit. See Exhibit X. According to Nurse Kent, if she made a chart entry or notation about an inmate, it was because she examined the inmate. See Exhibit X. She was conscientious about documenting her exams to address grievances or complaints by inmates about the care they received from her. See Exhibit X. She explains that, at the time of November 28, 2002, medical rounds were made in confinement and close management units on a daily basis. There was no exception for weekends and holidays. See Exhibit X. Given that Plaintiff has not provided a plausible "scintilla" of evidence to counter the medical documentation, he fails to defeat Defendants' motion for summary judgment.

IV. Title 42 U.S.C. § 1997e(e)

The relief of compensatory and punitive damages sought by Plaintiff is precluded by Title 42 U.S.C. § 1997e(e). As previously explained in the Special Report, Doc. 61, the negligible "injuries" of a small mark behind Plaintiff's left ear on the scalp near the hairline and slight bruising to his ear falls far short of demonstrating a more than de

minimis physical injury as required by 42 U.S.C. § 1997e(e).

CONCLUSION

WHEREFORE, based on the foregoing, Defendants respectfully request this Honorable Court accept this supplement to the Special Report in support of a grant of summary judgment in favor of the Defendants.

Respectfully submitted,

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

/s/Joy A. Stubbs
Assistant Attorney General
Florida Bar No.: 0062870

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by U.S. Mail to Ramon Armas Borroto X27467 at Florida State Prison, 7819 N.W. 228th Street, Raiford, Florida 32026-1230 on this 30th day of January, 2006.

/s/ Joy A. Stubbs
Assistant Attorney General